

Letter of Findings Number: 03-20130123
Withholding Tax
For Tax Years 2005-2011

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ISSUE

I. Withholding Tax— Imposition.

Authority: Snell v. C.J. Jenkins Enterprises, Inc., 881 N.E.2d 1088 (Ind. Ct. App. 2008); IC § 6-8.1-5-1; IC § 6-8.1-5-2; [45 IAC 3.1-1-97](#).

Taxpayer protests imposition of withholding tax for the years at issue.

STATEMENT OF FACTS

Taxpayer is an Indiana business. As the result of an investigation the Indiana Department of Revenue ("Department") determined that Taxpayer had under-remitted on its state and county withholding tax duties for the tax years 2005, 2006, 2007, 2008, 2009, 2010, and 2011. The Department therefore issued proposed assessments for state and county withholding tax, penalties, and interest for those years. Taxpayer protests these proposed assessments. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Withholding Tax— Imposition.

DISCUSSION

Taxpayer protests the imposition of withholding tax for the tax years 2005-11. The Department based its determination of withholding tax due on several factors. Taxpayer protests that the individuals in question were independent contractors and that it was not responsible for collecting and remitting withholding tax on them. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as required by IC § 6-8.1-5-1(c).

The relevant regulation is [45 IAC 3.1-1-97](#), which states in relevant part:

Employers who make payments of wages subject to the Adjusted Gross Income Tax Act, and who are required to withhold Federal taxes pursuant to the Internal Revenue Code (USC Title 26), are required to withhold from employees' wages Adjusted Gross and County Adjusted Gross Income Tax.

Therefore, an employer is required to withhold adjusted gross and county adjusted gross income tax from payments of wages made to its employees.

Also, the Department refers to IC § 6-8.1-5-2(f), which states:

If a person files a fraudulent, unsigned, or substantially blank return, or if a person does not file a return, there is no time limit within which the department must issue its proposed assessment.

(Emphasis added).

In this case, Taxpayer did not file withholding tax returns for the years at issue, therefore there is no time limit for the Department to issue proposed assessments for withholding tax for those years, as provided by IC § 6-8.1-5-2(f).

Taxpayer states that there are several factors under the federal Internal Revenue Service's ("IRS") guidelines which should be taken into account when determining if an individual is an employee or an independent contractor. The Department notes that the Court of Appeals of Indiana addressed the problem of determining if a person is an employee or an independent contractor in the case Snell v. C.J. Jenkins Enterprises, Inc., 881 N.E.2d 1088 (Ind. Ct. App. 2008). In that case, the plaintiff (Snell) wanted to be considered an employee in order to recover some money, which he believed was owed by the defendant (Enterprises), using Indiana wage statutes. The court determined that the plaintiff was an independent contractor. The court explained:

Because the question at issue here is whether Snell was Jenkins's employee or an independent contractor, we too will employ the ten-factor test pursuant to the Supreme Court's direction in Moberly. These ten factors are as follows:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;

- (h) whether or not the work is a part of the regular business of the employer;
 - (i) whether or not the parties believe they are creating the relation of master and servant; and
 - (j) whether the principal is or is not in business.
- (Id., at 1091).

The court discussed each factor and determined whether that particular factor weighed towards Snell's status as an employee or an independent contractor. The court also considered how strongly each factor weighed in which direction. Ultimately, the court determined that enough factors weighed strongly enough to rule that Snell was an independent contractor.

In the instant case, Taxpayer discusses the IRS factors but provides little documentation in support of its position that the individuals were independent contractors and not employees. Taxpayer did provide copies of some federal 1099 forms, which are given to independent contractors for federal tax reporting purposes. Taxpayer's issuance of the 1099s weighs in Taxpayer's favor as explained in factor (i) in Snell. However, factors (h) and (j) weigh against Taxpayer since it was in business during the years in question and the work in question was a regular part of that business.

There is no documentation to establish the status of the remaining factors and, as previously mentioned, the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as required by IC § 6-8.1-5-1(c). In this case, Taxpayer has only shown that one of ten factors weighs in its favor. Therefore, Taxpayer has not met the burden of proving the proposed assessments wrong. However, the Department will remove the amounts of payments listed on the 1099s provided in the protest process. The remaining amounts of withholding tax will remain due.

FINDING

Taxpayer's protest is sustained in part and denied in part, as described above.

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